

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent,

and

OFFICE OF MINERAL, STATE OF NEVADA and UNITED
ENERGY COMPANY OF AMERICA,

Intervenors.

for the purpose of hearing and Application for Stay of Judgment
and Writ of Certiorari.

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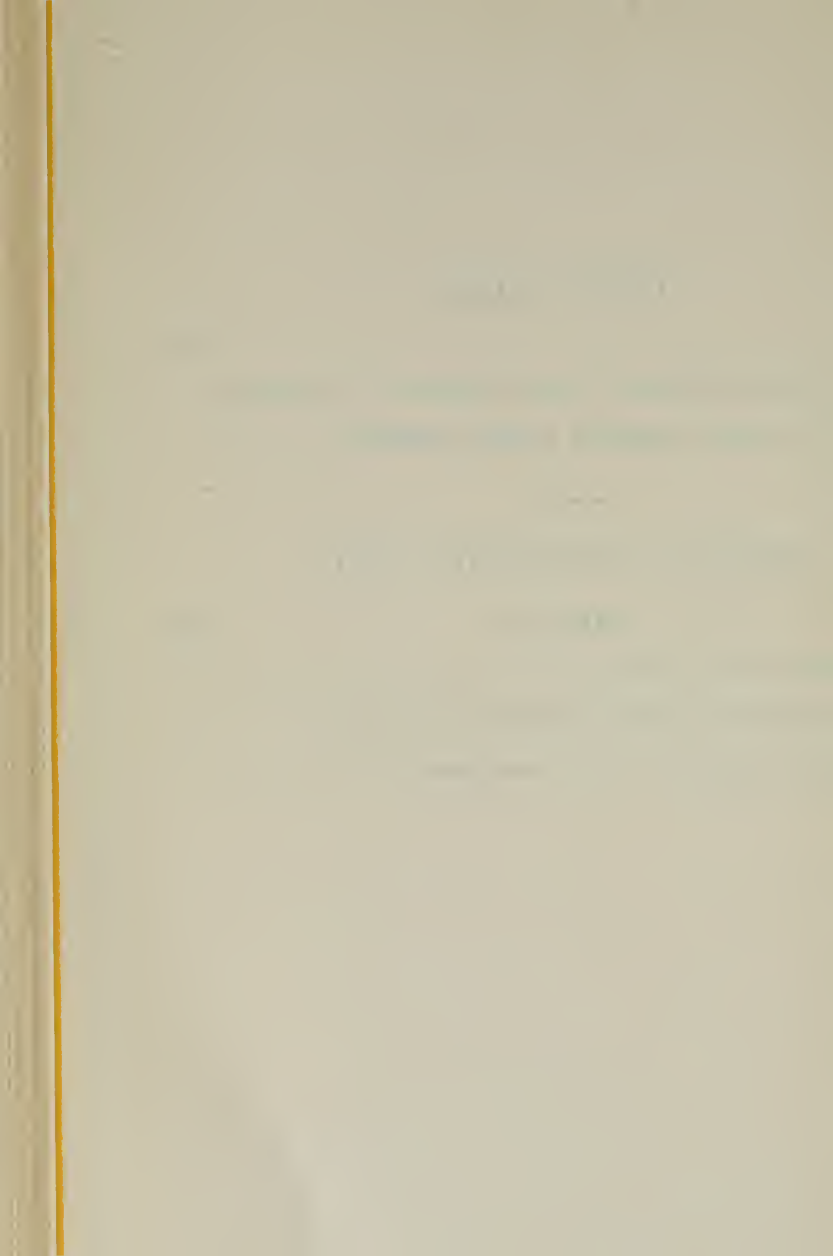
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

THE FEDERAL POWER COMMISSION,

Respondent,

and

THE DEPARTMENT OF MINERAL, STATE OF NEVADA and UNITED STATES OF AMERICA,

Intervenors.

PETITION OF CALIFORNIA ELECTRIC POWER COMPANY FOR REHEARING.

Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:

The California Electric Power Company respectfully petitions your Honorable Court for a rehearing in the above-captioned case with respect to Point IV of Petitioner's Brief. In support of this petition, Petitioner re-submits the following as follows:

On October 14, 1952, judgment of this Court in the

in said Petitioner's Opening Brief. It is respectfully requested that this Court may have inadvertently overlooked Point IV. Without waiving any objections raised to the Order of the Federal Power Commission and reserving to itself the right to urge all such objections in possible review proceedings before the Court of the United States, Petitioner requests consideration of this point only.

Under Point IV of said Brief Petitioner requests that even if its sales of electric energy to Navy and Mineral County be subject to jurisdiction of the Federal Power Commission, the challenged Order is unlawful. The Order directs Petitioner to cease and desist from charging Mineral County Power System any rates other than those in filed Rate Schedule FPC No. 15 (which expires by its terms on October 5, 1948) until and unless such expired schedule is duly superseded by a properly supported new filing or by a rate prescribed by the Commission, and directs Petitioner to file as a rate schedule the specific rates and charges set forth in its Agreement dated July 1, 1943, with the Navy (which Agreement was cancelled in accordance with its terms October 5, 1948) such schedule to be effective until and unless such schedule is superseded by a properly supported new filing or by a rate prescribed by the Commission.

The facts are that the contract with the Navy entered into July 1, 1943, was to run for a period of 60 days and thereafter until 60 days notice of termination was given by either party to the other. Petitioner, by a 60-day notice, terminated said contract as of October 5, 1948. The Federal Power Commission did not fix or

did not file or require Petitioner to file said rates as a rate schedule under its Rules, nor did Petitioner do so. Assuming the Federal Power Commission has jurisdiction over the rate to the Navy, the proper order for it to make would be one in the negative, either to file rates or to cease and desist from doing so. If rates were then filed which appeared unreasonable, the Commission could have proceeded under Section 205(e) of the Federal Power Act to order the rates and enter upon a hearing. To order the filing of specific rates contained in a contract entered into in 1943, since which time the purchasing power of the dollar revenue dollar has shrunk 50%, without first requiring of Petitioner a hearing as to the reasonableness of the rates was unlawful and an improper discharge of the responsibility of the Commission, and if the Order is allowed to stand Petitioner will be deprived of its property without due process of law.

Petitioner and its predecessors have served Mineral County Power System for many years under a series of contracts, the last being one entered into October 1, 1945, providing that, for the term of three years from that date. Petitioner would furnish and Mineral County Power System could purchase all of the electric energy required by Mineral County for resale and distribution in the State of Nevada, at rates set forth in the contract. Said contract was filed with the Federal Power Commission as a rate schedule FPC No. 15." On October 5, 1948, said contract expired in accordance with its terms and ceased to operate as an effective and operative rate schedule. Mineral County Power System was served in

tornia. Assuming that the Federal Power Commission has jurisdiction over the rates charged Mineral County Power System it could properly have ordered the System to file the rates it intended to charge, or cease to exist from service. But to order Petitioner to desist from charging Mineral County any rates higher than those contained in a contract designed for five years, which had expired by its terms and cease to exist as a rate schedule, without first affording Petitioner a hearing as to the reasonableness of said rates, is not lawful and if the Order is allowed to stand Petitioner will be deprived of its property without due process of law.

Wherefore, it is prayed that a rehearing of the Order be granted and that on such rehearing the Court reverse the Order of the Federal Power Commission.

Respectfully submitted,

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for Petitioner

HAROLD M. HAMMACK,

KENNETH M. LEMON,

Of Counsel.

Certificate of Counsel.

I do hereby certify that I have read and know the contents of the foregoing petition and certify that the petition is filed in good faith and not for purposes

DONALD J. CARMAN

No. 12987.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAVIA ELECTRIC POWER COMPANY, a corporation,
Petitioner,

vs.

POWER COMMISSION,

Respondent,

and

DEPARTMENT OF MINERAL, STATE OF NEVADA and UNITED
STATES OF AMERICA,

Intervenors.

APPLICATION FOR STAY OF JUDGMENT PENDING CERTIORARI.

Honorable the Judges of the United States Court
of Appeals for the Ninth Circuit:

My application of the Court in the above matter was entered on the docket of the Court on October 14, 1952, affirming an order of the Federal Power Commission. Petitioner has applied to this Court for a rehearing of said matter. Should said rehearing be denied, or should said judgment be affirmed, Petitioner respectfully requests this Court

to obtain a writ of certiorari from the Supreme Court of the United States, and, as grounds therefor state:

1. That the preservation of the *status quo* in the present case pending final decision of the Supreme Court will not entail no possible injury to the United States, Navy Department, Ammunition Depot, Hawthorne, Nevada (Navy) or to Mineral County Power System for the following reasons:

(a) That Navy is now paying and at all times has paid rates only as set forth in Navy's prior and existing contract and as required by said Order of the Federal Power Commission to be reinstated, Navy having granted to Petitioner a "letter of intent" binding Navy to pay the higher rates claimed by Petitioner as may be finally determined to be lawful; and

(b) That, while Mineral County Power System has paid Petitioner rates higher than those named in the expired contract, which said Order of the Federal Power Commission requires to be reinstated, Petitioner's compliance pursuant to Stay Order of this court filed August 1, 1951, established a segregated reserve for the payment beginning October 5, 1948, of the difference between the amounts actually charged by Petitioner and the amounts which would have been charged under said expired contract. Accruals to said reserve must continue to be made until the final disposition of the review proceeding by the Supreme Court or the further order of this court. Disposition

such accruals to said reserve pending review by the Supreme Court and is ready, willing and able to furnish such further assurance thereof as to this Court may be necessary or proper.

That the enforcement of said Order of the Federal Power Commission which Petitioner believes to be invalid, pending final determination by the Supreme Court of the constitutionality of the Federal Power Commission to enter such an order, would be unfair and inequitable and would constitute a taking of Petitioner's property without due process of law and would be contrary to Amendment V to the Constitution of the United States, for the following reasons:

That, if Petitioner, pursuant to said Order, should be required to publish the schedule of rates required thereby, including, for example, the rates named in said expired contracts, such rates would probably become the lawful rates pending review by the Supreme Court, even though said order of the Federal Power Commission were finally set aside.

That the difference between the rates claimed by Petitioner to be lawful and the lower rates which would be required pursuant to said order of the Federal Power Commission as to Navy, is approximately \$2,100 per month for the Mineral County Power System, approximately \$1,000 per month; hence, pending review by the Supreme Court, Petitioner would be deprived of approximately \$2,100 per month even though said Order of the Federal

named in a prior and expired contract with County Power System, but also requires Petitioner to repay to Mineral County Power System the difference between said two rates back to October 5, 1948, amounting to not less than \$120,000; and that, if said Order of the Federal Power Commission were complied with, and thereafter held invalid by the Supreme Court, Petitioner would have no remedy to recover from Mineral County Power System the money thus uncollected for the period pending review in the Supreme Court or money for past service, for the reason that Mineral County Power System has no income or funds, except as collected from its customers and remaining for payment of its expenses, and funds set apart for purposes such as depreciation or replacement of property, and has no power of taxation or assessment to collect funds to pay obligations in excess of income, and there would be no way to require Mineral County Power System to charge rates sufficient to pay Petitioner's claim, to hold in reserve money rebated by Petitioner or to accumulate reserves to pay for future service at the higher rate.

(d) That the Federal Power Commission has no jurisdiction whatever over Navy or Mineral County Power System and, in the event its said Order were held invalid, the Federal Power Commission could not order or require of them to pay Petitioner any money whatever for any reason or purpose at all.

t if Petitioner fails to make application for a
certiorari within the period allotted therefor, or
obtain an order granting its application, or fails
its plea good in the Supreme Court, it shall
for all damages and costs which the Respondent
incurs may sustain by reason of the Stay.

Therefore, Petitioner prays that this court issue an
order staying the execution and enforcement of its judg-
ment rendered October 14, 1952, in the above entitled mat-
ter for a reasonable time to enable Petitioner to obtain
certiorari from the Supreme Court of the
United States.

This 27th day of October, 1952.

HENRY W. COIL,

DONALD J. CARMAN,

Attorneys for Petitioner.

W. H. HAMMACK,

M. LEMON,

Counsel for Petitioner.

